No. 87-271

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

HARBISON-WALKER REFRACTORIES,
A Division of Dresser Industries, Inc.,

Petitioner,

v.

EUGENE F. BRIECK,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR RESPONDENT

JAMES H. LOGAN*
Logan & Logan
307 Fourth Avenue
Pittsburgh, Pa. 15222
(412) 765-0960

JULIUS L. CHAMBERS
CHARLES STEPHEN RALSTON
RONALD L. ELLIS
ERIC SCHNAPPER
NAACP Legal Defense and
Educational Fund, Inc.
99 Hudson Street
New York, New York 10013
(212) 219-1900

Counsel for Respondent

*Counsel of Record

QUESTION PRESENTED

Does the record in this case present genuine issues of material fact regarding respondent's claim of unlawful discrimination?

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No. 87-271

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1987

HARBISON-WALKER REFRACTORIES,
A Division of Dresser Industries,
Inc.,

Petitioner,

v.

EUGENE F. BRIECK,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF FOR RESPONDENT

STATUTE AND CONSTITUTIONAL PROVISION INVOLVED

Section 4(a)(1) of the Age Discrimination in Employment Act of 1967, 29 U.S.C. § 623(a)(1) provides in pertinent part:

> It shall be unlawful for an employer ... to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age....

The Seventh Amendment to the United States Constitution provides:

> In suits at common law, where the value in controversy shall exceed twenty dollars, the right to trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

STATEMENT OF THE CASE

The petitioner in this case is a manufacturer of specialized ceramic brick products which are sold primarily to steel producers. From 1965 until the early summer of 1982 respondent Eugene Brieck was employed by the firm as an installation specialist. In July of 1982, faced with a substantial decline in its

sales, Harbison-Walker began to reduce the workforce in the Iron and Steel Marketing Group in which respondent worked. Although Brieck, then aged 55, was the most senior installation specialist, and one of the more senior members of the entire group, he was the very first employee laid off. (Pet. App. 17a-18a; J.A. 31, 33) Brieck had 17 years of experience as a an installation specialist, compared to only 3 years of experience, some or all of it devoted to on the job training, for H.L. Faust, the youngest installation specialist. (J.A. 33, 50, 152-54) During July, 1982, Harbison-Walker laid off 7 of the group's 33 employees, including 3 of the 5 employees who were then 55 or older. Among the company's installation specialists, all of the employees over 40 -- the age group protected by ADEA -- were

laid off in July. (J.A. 31-33). The remaining installation specialist, H.J. Faust, then 39, was retained until November of 1982; in the summer of 1983 Faust was recalled to a permanent position as an installation specialist. (J.A. 135, 159) Harbison-Walker never offered either that or any other position to respondent after he was laid off.

On July 19, 1982, respondent filed with the Pennsylvania Human Relations Commission an administrative charge alleging that he had been laid off because of his age. (J.A. 6). On June 29, 1984, Brieck brought this action against Harbison-Walker,[1] alleging that the

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[1] Brieck also asserted a state law claim for breach of contract and for intentional infliction of emotional distress. (Complaint, ¶¶ 21-33). The Third Circuit upheld the dismissal of those claims (Pet. App. 17a-20a), and respondent did not seek review of that dismissal by this Court.

company had terminated and failed to recall him because of his age, in violation of the ADEA, and requesting a jury trial. (J.A. 2-7). After discovery was completed, the company filed a motion for summary judgment. The company did not, of course, deny that there was a dispute regarding whether it had engaged in intentional discrimination, or that that dispute was material to Brieck's ADEA claim; it contended, however, that the dispute regarding this material fact was not "genuine" because there was no evidence to support Brieck's allegation. Brieck opposed this motion. Both petitioner and respondent relied in the district court on depositions that had been taken, and documents which had been produced during the course of discovery, as well as on affidavits submitted in connection with the disputed motion.

The district court granted the motion for summary judgment on December 19, 1985. (Pet. App. 12a-21a). The district judge did not purport to find that no reasonable jury could return a verdict for Brieck, and did not refer to the fact that a jury trial had been requested. Rather, the judge apparently proceeded on the assumption that, if the subsidiary facts were clear, the court's responsibility was to decide what inferences ought to be drawn from those facts, and thus to itself dispose the case on the merits. In granting summary judgment regarding Brieck's ADEA claim, the district judge wrote:

> Any question about ... how Faust spends his time edges into an area of scrutiny of business decisions, which is not part of our function. We ... consider it plausible that the importance of an employee's related experience, whether or not applied, increases under the scaled-down business operations

> which in fact existed. Without considering age, we find that Mr. Brieck, in comparison to Faust, has
>
> 1. slightly more seniority;
>
> 2. slightly poorer performance evaluations;
>
> 3. little experience in areas [un]related to installation specialist.
>
> We thus cannot find that age was a determinative factor in the decision to lay off Mr. Brieck. Other facts support this finding.[2]

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[2] Pet. App. 17a. (emphasis added) The district court's treatment of Brieck's state law claims reflected this same approach. In rejecting Brieck's breach of contract claim, the court explained:

> "Viewing d[efen]dant's statements most favorably to plaintiffs, they do not establish violation of a contract.... We find [Brieck's] evidence insufficient to satisfy the requirement for a provision setting the length of the contract.... Mr. Brieck ... has not established the form of a contract which supports his claim."

(Pet. App.18a-19a) (emphasis added). The district court's discussion of the claim

The third circuit correctly criticized the district judge for having undertaken to decide what inferences should be drawn from the evidence (Pet. App. 5a-6a), and petitioner does not in this Court rely on the trial judge's "findings". On October 2, 1986, the third circuit reversed the award of summary judgment, and remanded the ADEA claim for trial; one member of the appellate panel dissented from the

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of Mr. Brieck and his wife for tortious infliction of emotional distress is similar in tone:

> "[W]e find that defendant's conduct in no way rises to the level of outrageousness necessary to invoke these theories.... [W]e conclude that the plaintiff clearly has not shown that defendant's conduct meets the test of extremeness required by this theory. Our finding necessarily precludes Mrs. Brieck's claim of negligent infliction of emotional distress based on defendant's same actions."

(Pet. App. 19a-20a)

decision to permit a trial of the ADEA claim.[3] (Pet. App. 1a-11a)

SUMMARY OF ARGUMENT

This appeal presents a classic case of the type of sharply conflicting evidence which must be evaluated by the ultimate trier of fact, and which cannot be resolved by means of summary judgment

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[3] Judge Weiss' dissenting opinion is based on a number of material misunderstandings regarding the evidence in this case. Judge Weiss believed Brieck was the second installation specialist to be laid off (Pet. App. 8a); in fact Brieck was the first. (J.A. 33) Judge Weiss assumed that, when Faust was rehired, another over-40 installation specialist, E.G. Malarich, was still interested in the position, and was the more likely victim of any age discrimination (Pet. App. 9a); in fact Malarich had by then taken early retirement. (J.A. 123-25) Most importantly, Judge Weiss thought Faust had testified that he spent 75% of his time, after being recalled, on installation work, with the remaining 25% devoted to non-installation tasks (Pet. App. 10a); in fact Faust testified that he spent "at least" 75% of his time doing installation work on the road, and that much of his remaining time was devoted to installation related work, such as filling out reports, back at the office. (J.A. 160).

for either party. Petitioner's brief cogently depicts the evidence and inferences most favorable to the employer, but omits mention of most of the at least equally persuasive evidence adduced by the respondent. A more thorough review of the depositions, affidavits and documents reveals stark and plainly material conflicts in the evidence regarding the qualifications of respondent, the circumstances under which he was laid off, and the qualifications and experience of the younger worker who was retained in his stead. The record also indicates that company officials have over the years offered widely varying explanations of their decision to lay off respondent, a discrepancy which a trier of fact might fairly regard as probative evidence of discrimination.

Petitioner insists it is entitled to summary judgment because it adduced sworn statements by company executives insisting that they acted with no unlawful motive in deciding to lay off respondent. But Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981), makes clear that a finder of fact may reject such protestations of innocence if it finds them "unworthy of credence." 450 U.S. at 256. Questions of credibility cannot be resolved on summary judgment, but must be determined by the trier of fact after observing the demeanor of the witness during direct and cross-examination. See Anderson v. Bessemer City, 470 U.S.564, 575 (1985). A dispute about a claim of intentional discrimination, like any question regarding the state of mind of an individual, "does not readily lend itself

to summary disposition." Hutchinson v. Proxmire, 443 U.S. 111, 120 n. 9 (1979).

This case was ready for trial in the summer of 1985. Instead of a trial that would have lasted no more than a few days, over three years have been consumed debating the strength and nuances of the evidence. The efficient administration of justice would have been far better served in this case if the district court had exercised its discretion to defer passing on petitioner's challenge to the sufficiency of the evidence until a jury had returned a verdict in the case.

ARGUMENT

I. THE RECORD PRESENTS GENUINE ISSUES OF MATERIAL FACT

This appeal presents a classic example of the type of conflicting evidence and inferences which must be referred for resolution by a jury or other trier of fact. If the instant controversy

had been tried on the merits, and were somehow before this Court for de novo reconsideration, it would fairly be regarded as presenting a close case. As we set out in detail below, the record in this proceeding contains not only evidence supporting quite inconsistent inferences, but also square conflicts in the testimony regarding several material issues; reasonable persons might well disagree as to how those conflicts ought to be resolved. Had this case been tried before a jury, and a verdict returned in favor of the petitioner, we would be hard pressed to overturn such a verdict on appeal; the record undeniably contains substantial evidence supporting the contentions of the petitioner, and petitioner's brief cogently summarizes those portions of that record most favorable to it and sets forth with considerable force the inferences

that might conceivably have been drawn from those selected portions of the record.

In the present procedural posture of this case, however, the issue is not whether a jury verdict in favor of petitioner could be sustained on appeal, but whether a jury should be permitted to consider the merits of the underlying controversy. Petitioner describes the record in this case in terms which, if accurate, might well support an order of summary judgment. Thus petitioner asserts that the critical facts were either "undisputed"[4] or "conceded,"[5] and repeatedly insists that respondent had literally adduced "no" evidence whatever

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[4] Pet. Br. 6, 15 n. 8, 23 n. 15.

[5] Pet. Br. 6, 16.

of an unlawful discriminatory motive.[6] The actual record before the Court, we

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[6] Pet. Br. i (respondent failed to present "any evidence, direct or indirect, that his employer's judgment was in fact motivated by an intent to discriminate"), 6 ("Respondent failed to produce any evidence that the Company's proffered business reasons were a pretext for age discrimination"), "8 ("respondent ... produced no evidence -- other than the age differential between him and Faust--linking the company's decision to age"), 11 ("Respondent offered no evidence that age played ... a role in the decision), 11 ("plaintiff has produced no direct or indirect evidence of age discrimination)," 16 ("Respondent produced no direct evidence that Harbison-Walker's decision was motivated by age discrimination. Nor did he present any indirect evidence..."), 17 ("Respondent presented no specific facts, beyond the fact that the laid-off installation specialists were older than Faust, to demonstrate that the company's articulated reasons were pretextual"), 18 ("Respondent failed completely to forge any link between the challenged decision and age discrimination"), 21 ("complete absence of record evidence to support a finding of age discrimination"), 23 ("Respondent's complete failure to adduce evidence concerning the essential element of his case -- discrimination on the basis of age...."), 24 (respondent lacked any "factual support for his case").

suggest, cannot fairly support this characterization.

In the instant case, as in Furnco Construction Corp. v Waters, 438 U.S. 567, 569 (1978), "[a] few facts ... are not in dispute." For some 17 years prior to June, 1982, respondent was an employee of petitioner Harbison-Walker, a diversified company whose activities include the manufacturing and sale of ceramic brick for use in industrial furnaces. Throughout this period respondent held the position of installation specialist; as of the spring of 1982 there were a total of four installation specialists in petitioner's Pittsburgh office, respondent (age 55), W. L. Meixell (59), Al Malarich (59), and Hugh Faust (39).[7] (J.A. 31, 33)

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[7] Some portions of the record describe the position held by Meixell not as installation specialist but as "senior installation specialist." Defendant's Response to Plaintiff's First Set of Interrogatories Directed to Defendant, Appendix A. If Meixell held a position different and indeed higher than Faust, the decision to retain Faust and lay off Meixell might well be interpreted by a jury as evidence of a practice of age discrimination.

Brieck was laid off by petitioner on July 2, 1982; petitioner subsequently laid off Meixell (July 9, 1982), Malarich (July 30, 1982), and last of all, Faust (November 18, 1982). (J.A. 33). The next year Faust was rehired[8] as a permanent employee, which he evidently remains to this day. (J.A. 149). Petitioner conceded that it had given no consideration to rehiring respondent when the 1983 vacancy, ultimately awarded to

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[8] Technically laid off employees were on temporary furlough for the first nine months after leaving the company, after which the furlough became permanent. (J.A. 113-14). It is unclear from the record whether this nine month period had lapsed when Faust returned to work. At least one other laid off employee, aged 22, was recalled after the expiration of this nine month period. (J.A. 33, 114).

Faust, arose. (J.A. 125) The central issue in this case, is whether petitioner acted with an intent to discriminate against respondent because of his age when, in July of 1982, it laid off respondent while keeping Faust on the job, or in August of 1983, when it rehired Faust rather than respondent.

(A) The decisions below and petitioner understandably focus much of their discussion on the reasons given by the company for deciding to retain and rehire Faust rather than respondent. In its brief in this Court petitioner now asserts that Faust was selected because he had as of 1982-83 more diversified experience and training. (Pet. Br. 4, 5). The record reveals, however, that company officials have over the course of this controversy given widely varying accounts

of the basis on which the disputed decisions were made.

The earliest explanation of the criterion for selecting employees for layoff came from Ralph Ytterberg, Senior Vice President of Dresser Industries, petitioner's parent company, in a company newsletter dated "Spring 1982". Ytterberg announced that "Length of company service and skill requirements ... are the most important considerations". (J.A. 47). Ytterberg's statement is important because it evidently predates the decision to dismiss respondent. Although there is considerable dispute in this case regarding what skills were needed in respondent's unit after June of 1982, and regarding what skills respondent and Faust in fact possessed, there is no dispute that respondent had more company seniority

than any of the other installation specialists, including Faust.[9]

Respondent's supervisor, Larry Sheatsley, stated in his deposition that Faust had been retained over Meixell on the basis of seniority (J.A. 105), but all of the company managers questioned conceded that, despite Ytterberg's announcement, respondent's greater seniority had not been considered when he was laid off instead of Faust. John Nicolella, Harbison-Walker's manager of employee relations, asked to explain why the company had retained Faust rather than respondent, asserted that Faust had greater seniority than respondent (J.A.

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[9] The seniority dates of the installation specialists were as follows:

Brieck	June 1965
Malarich	August 1966
Faust	September 1966
Meixell	January 1980

J.A. 33.

132), a statement which petitioner now acknowledges was incorrect. (Pet. Br. 3). Sheatsley asserted that he premised his choice between petitioner and Faust on the assumption that they had "about the same years service with Harbison" (J.A. 105), a statement which a jury might find inconsistent with the 15 month difference in seniority, or with Ytterberg's announcement that seniority was an important consideration. Sheatsley's deposition testimony that he was aware of the seniority of each of the four installation specialists was seemingly contradicted by respondent's deposition which recounted that, in the course of telling Brieck he was being laid off, Sheatsley had professed surprise at learning that Brieck had more seniority than Faust. (J.A. 79). Finally, petitioner offered in support of its

motion for summary judgment an affidavit of William Sekeras, Sheatsley's supervisor, which contained his own account of the directions given to Sheatsley for selecting the employees to be laid off; the Sekeras affidavit contains no reference whatever to seniority as a consideration (J.A. 13), which seems less than fully consistent with Ytterberg's earlier announcement, or with the reasons given by Sheatsley for laying off Meixell rather than Faust.

On June 17, 1982, when the decision to lay off respondent had been made, at least tentatively, but had not yet been announced, company executive F. P. Shonkwiler addressed an internal memorandum to Nicolella explaining that respondent had been chosen for layoff because he was "our least qualified Installation Specialist and has limited

expertise". (J.A. 145). The most noteworthy fact about this contemporaneous internal explanation is what it does not contain, viz. any suggestion that the choice had been based on respondent's comparative ability to perform functions other than those of an installation specialist. In this Court, of course, petitioner offers a rather different explanation, insisting that the decision to lay off respondent rather than Faust was based on the need for an employee who could work on noninstallation tasks. Were the company still sticking with the explanation given by Shonkwiler in 1982, this case would certainly have to be referred by a jury, for there are direct and unequivocal conflicts in the testimony regarding the comparative skills of respondent and Faust as installation specialists. (See section I(B), infra).

The next occasion when the reasons for respondent's layoff were discussed was on July 2, 1982, when Sheatsley informed respondent that he was being furloughed. Respondent testified at his deposition that he had asked why he had been selected for layoff, and was given a seemingly evasive response:

> I says, "why me?"
> He says, "we got to start somewhere"
>
> * * *
>
> Then I asked him about these young kids. I said, "What about all these young kids?" And he just wouldn't say nothing. he just sort of shrugged his shoulders ... [T]he younger kids ... there was a dozen of them with less than maybe a year's service, if that much.

(J.A. 81; see also id. at 85). A jury might plausibly infer from Sheatsley's silence that he had as of June, 1982, no legitimate explanation to offer, and that the explanation which he gave in his 1985

deposition had been concocted in the interim. On the other hand, both Sheatsley and another supervisor in the room during this exchange stated in their depositions that they could not recall what questions respondent had asked, or what answers Sheatsley had given, regarding how the company had decided to lay off respondent rather than Faust or others. (J.A. 108, 122-23).[10]

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[10] Three days after he was laid off, respondent spoke by phone with the president of Harbison-Walker, Don Stocks, and directly complained that he had been laid off while far younger, and necessarily less senior, employees were retained:

> "A. I ... says, You are keeping all these kids, and your[sic] neglecting me.
>
> "Q. And what did he say to that?
>
> "A. He says, I can't interfere with the process." He says, "I am sorry. Goody[sic]."

(J.A. 83). A jury might have construed Stock's statement merely as a refusal to become involved in personnel matters, or

Respondent's objection to the retention of younger, less senior workers was aired again later in 1982 at a meeting at the office of the Pennsylvania Human Relations Commission, attended by respondent and by John Nicolella, the firm's personnel director. At his subsequent deposition respondent recounted that the following exchange had occurred at that meeting between himself and Nicolella:

> [A]t that meeting, I asked [Nicolella], "John," I says, "Why are you keeping these kids and getting rid of me?"
>
> He says, "Gene, these kids are going to be our future managers." And that's all he said.

(J.A. 83). Nicolella's remark could conceivably be construed in more than one way; but a jury might plausibly interpret

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as a deliberately evasive response to an inquiry for which he knew there was no legitimate response.

his statement as expressing a preference for retaining younger employees who, unlike workers such as respondent in their fifties, would still be with the company many years in the future.

There were seeming inconsistencies in the statements made by company officials regarding whether differences in the performance ratings of respondent and Faust had played a role in the critical decision. Nicolella flatly asserted that ratings differences had "come into play." (J.A. 133, 134). Sheatsley, who was responsible for the initial recommendation to lay off respondent rather than Faust, made no reference whatever to having considered ratings, but based his explanation solely on alleged differences in the experiences of respondent and Faust outside the area of installation work. (J.A. 105-06). Sheatsley's, supervisor,

William Sekeras, submitted a deposition taking an intermediate or possibly equivocal position, asserting that diversity of experience was "[t]he principal reason underlying Faust's retention", but then adding, "Also, Faust had slightly higher performance ratings than Brieck". (J.A. 14-15). Nicolella asserted in his 1985 deposition that "Mr. Faust is rated higher than Mr. Brieck" (J.A. 133); but the 1982 memorandum on the basis of which Nicolella approved respondent's layoff asserted that he and Faust had the same rating. (J.A. 147-48). Malarich undeniably had a higher rating than Faust (J.A. 148), but none of the Harbison-Walker executives offered any account of why this had not helped Malarich when he was laid off, and Faust retained, several weeks after respondent lost his job.

Finally, in his July, 1985, affidavit Sekeras offered an entirely new explanation of the retention of Faust rather than Brieck, asserting that Faust had a unique expertise regarding a particular important type of brick installation:

> Faust was the only installation specialist who had experience in installation work in blast furnace casthouses, an area that had been targeted by Harbison-Walker as a growth market and an area that represented significant potential even during the 1982 period.

(J.A. 14). Had this explanation been offered in June or July 1982, when Brieck was first laid off, it might well have carried considerable weight, and it is of course possible that a jury might yet credit it at trial. But the timing of this new explanation might well lead a jury to a very different conclusion. At his March 1985 deposition Larry Sheatsley,

who initially selected Brieck for layoff, although repeatedly asked why Faust was retained, made no reference whatever to blast furnace casthouses, either as an area of differing expertise or as having any importance to the company. (J.A. 104-06, 111-12). Similarly Harbison-Walker's personnel manager, John Nicolella, was repeatedly asked at his, May 1985 deposition, the reasons for Faust's retention, and he too made no reference to blast furnace casthouses. (J.A. 131-32). Only in July of 1985, after the completion of discovery, did the company produce a witness to offer this new explanation.

We do not contend that any rational jury would necessarily see in these ever-shifting explanations decisive proof of invidious discrimination. It is at least conceivable that counsel for the company could persuade a jury that these apparent

inconsistencies were merely the result of a series of misunderstandings -- that Sheatsley, Sekeras, Nicolella and Shonkwiler simply had completely different reasons for arriving coincidentally at the same conclusion that Brieck should be laid off, that Sheatsley and Nicolella made a bona fide mistake in not realizing that Brieck had more seniority than Faust, and that Nicolella never read Shonkwiler's memorandum of June 17, 1982. But surely a reasonable jury could draw from these divergent accounts a very different conclusion, that Brieck was in fact selected for lay off because of his age, and that from 1982 to 1985 Harbison-Walker's supervisors concocted a series of explanations in search of a purported

justification with a patina of plausibility.[11]

(B) Varying testimony about the reasons for laying off respondent rather than Faust would be sufficient to defeat the motion for summary judgment, even if there were no dispute about differences in the qualifications of respondent and Faust. In fact, however, such disputes abound, and in most instances are the result of direct conflicts in the evidence.

In his 1985 deposition Sekeras asserted that the ratings of Faust and Brieck were as follows:

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11 The lower courts have repeatedly recognized that such a shifting explanation of an employer's conduct is probative evidence of the existence of a discriminatory motive. Schmitz v. St. Regis Paper Co., 811 F.2d 131, 133 (2d Cir. 1987); Kilgo v. Bowman Transp. Co., 789 F.2d 859, 875 (11th Cir. 1986).

	Brieck	Faust
1981	3	3
1980	2	3
1979	2	3
1978	3	4

(J.A. 15). Under the Harbison-Walker rating system a "3" means "fully satisfactory". (J.A. 133, 161). Brieck's supervisor during the years from 1978 to 1981, however, testified he never rated Brieck lower than fully satisfactory (J.A. 120), seemingly contradicting the 1979 and 1980 ratings in Sekeras' affidavit. The Sekeras' affidavit contains no ratings for 1982; an internal memorandum of that year, however, reveals that Brieck and Faust received the same rating in 1982. (J.A. 135, 146). The only uncontradicted difference in ratings is for 1978, some four years before the layoffs in question, a gap in time that seems inconsistent with the tense of Nicolella's 1985 deposition statement that "Mr. Faust is rated higher

than Mr. Brieck." (J.A. 133) (emphasis added). In addition, Faust testified that he did not become an installation specialist until 1978 or 1979 (J.A. 152-53), which suggests that his 1978 rating of "4" was in all probability a rating for a job different than that which was at issue in the 1982 layoffs.[12] Even Sekeras asserted only that there were differences in ratings in 1980 and earlier years (J.A. 15); the contemporaneous June, 1982, memorandum discussing the decision to lay off Brieck rather than Faust, however, cited only their 1981 and 1982 ratings, suggesting that older possibly unequal ratings were not considered when the 1982

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[12] The relevance of such out-of-date ratings to the 1982 layoff decisions is further called into question by the fact that, only a few months before he was laid off, Brieck had been awarded a raise and a letter of commendation. (J.A. 4, 51, 75). The company offered no evidence that Faust's work had been lauded or rewarded in this manner.

decision was made. (J.A. 146). In August, 1982, in a written explanation of the decision to retain Faust, the company asserted to the Pennsylvania Human Rights Commission that Faust "has been rated very good to fully satisfactory in the last three years."[13] That assertion is flatly contradicted by the Sheatsley deposition and the company's internal memorandum of June 1982, which indicate that Faust had not received a "very good" (4) rating in any of the four prior years.

There was also a clear conflict in the evidence regarding Faust's comparative ability, indeed his competence, to do the work of an installation specialist, which remained the bulk of his duties both in 1982 and after he was rehired in 1983. Sekeras, of course, asserted in his

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[13] Deposition Exhibit 7, Deposition of John Nicolella.

affidavit that only Faust had experience with blast furnace casthouses. (J.A. 14). Brieck, on the other hand, asserted in his deposition that Faust was little more than a trainee who had never worked on an installation job on his own, but always did so in the company of one of the other installation specialists. (J.A. 68-69; see also id. at 52). If Brieck was correct, Sekeras' affidavit was necessarily wrong, for Faust could not have had unique experience regarding casthouses or anything else if all his installation experience had been acquired in concert with another specialist. Indeed, Brieck's account, if credited by a jury, would strongly suggest that Faust was the least competent employee to do the specialist work which remained the core of his position. Brieck's deposition, on the other hand, was directly contradicted by

Faust, who stated in his deposition that he had been sent out on his own. (J.A. 155). Faust's deposition testimony regarding his experience with casthouse installations was somewhat opaque, apparently referring only to the period after the July 1982 layoffs, and not explaining clearly what work he had done in this area. (J.A. 150).

There was conflicting evidence, as well, regarding Brieck's experience and abilities. In an affidavit submitted in response to the motion for summary judgment, Brieck asserted he was the only one of the four installation specialists who had ever worked on international assignments,[14] which constituted an important segment of the firm's business.

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[14] J.A. 51 ("I was the only one of the four installation specialists in the Iron and Steel Marketing Group who had been sent out on international installation assignments").

(J.A. 18). On the other hand, Sheatsley asserted in his deposition that others had worked overseas, although it is somewhat unclear whether Sheatsley was referring to other installation specialists, and there is no suggestion that Faust had ever worked on overseas projects.[15] Nicollela asserted that Faust was retained rather than his older colleagues because those other installation specialists, Brieck included, could not do any thing except "just supervise the installation of brick in a steel mill". (J.A. 132). Nicollela's contentions were squarely disputed by

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15 J.A. 102:

"Q: Were other individuals sent on Overseas' assignments, or was it most likely Mr. Brieck who would be doing that in terms of the Installation Specialists in the Iron & Steel Market?

"A: I'll say I'm aware that others were sent on installation assignments Overseas besides Mr. Brieck. Specifically who and when, I'd have to go back and check."

Brieck's affidavit and deposition, which asserted that Brieck had extensive experience in preparing reports and surveys (J.A. 52, 62), technical drawings (J.A. 52, 63) and marketing analyses (J.A. 63), in analyzing technical problems which customers were experiencing with their furnaces (J.A. 60, 63), in designing the masonry interiors of blast furnaces (J.A. 61), and in pricing and sales. (J.A. 52, 58).

There was similar disagreements about the nature of Faust's experience outside the area of installation. Sekeras and Sheatsley broadly characterized Faust's office work as administrative. (J.A. 15, 105). Faust's deposition, however, suggested that, aside from preparing certain essentially clerical calculations and correspondence, his position was that of "gofer":

A. I usually do a lot of things that people just tell me to do. Like a car needs fixed, got something out at advertising that we need. Whatever. Even drove a forklift down the warehouse one time.

Q. So if somebody had to go for something, you might have to do that?

A. Not have to, I would be asked nicely to do it. I would volunteer.

Q. Excuse me for degrading your role, but would part of your job be to be a gofer?

A. Sure. I don't mind doing that. It's something different.

Q. I'm not saying anything bad about it, but part of your job was to be the officer handyman?

A. Yeah. That was part of being staff correspondent.

(J.A. 156-57). Sekeras asserted Faust had had "considerable contact in customer relations" (J.A. 14), and in this Court petitioner describes Faust's experience as "marketing" and "sales". (Pet. Br. 6, 7, 23). In his deposition, however, Faust

conceded that his work as an "assistant correspondent" was largely limited to processing written orders:

Q. Were you involved in sales at all or was your job more or less to support the sales staff?

A. Support the sales staff, but I did have direct contact with customers. On the phone. Phone contact.

Q. What percentage of your time was spent in the office when you were a correspondent?

A. One hundred percent....

Q. Had you ever been involved in sales in any respect during your employment with Harbison-Walker?

A. No, but we feel like we are a part of sales. Staff support.

Q. You support the sales, but you yourself were never performing an actual sales function yourself?

A. No....

(J.A. 152-55). In a September 1982 response to a request for information from the Pennsylvania Human Relations

Commission, petitioner asserted that Faust's job duties included helping to "make engineering sketches and technical preparation and proposals." (J.A. 147).[16] In his deposition Brieck squarely asserted that Faust neither did nor had the ability to do any technical work or sketches (J.A. 68-69), and Faust's description of his own experience at Harbison-Walker makes no mention of any such experience or ability. (J.A. 149-60).

There is no dispute that Faust's experience at Harbison-Walker included two positions which Brieck never held--assistant sales correspondent and staff correspondent. (J.A. 151-53). What is

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[16] In a letter to the Commission dated August 2, 1982, the company explained that it had retained Faust because he possessed "multidisciplinary skills in engineering." Deposition Exhibit No. 7, Deposition of John Nicolella. This explanation also seems inconsistent with the depositions of Faust and Brieck.

very much at issue, and far from clear from the present record, is what Faust actually did in those positions. Petitioner suggests that Faust was a marketing expert and administrator, with refined skills and broad experiences, while Brieck was merely a bricklayer. While the record is not utterly devoid of evidence to buttress that contention, the record seems on balance to provide greater support for a very different conclusion, that Faust was little more than a glorified gofer, less than fully qualified even to do the work of an installation specialist, and possessed only of rudimentary office skills which a person of ordinary ability could master in a few days. (J.A. 52-53, 68, 149-60).

(C) There are a number of important areas in which the underlying facts are undisputed, but regarding which very

different inferences could reasonably be drawn. Petitioner offered in support of its motion a statistical analysis purporting to demonstrate that it could not have acted with any discriminatory motive. That analysis indicates that among the Marketing Group employees 40 and over only 21% were laid off, compared to 47% of the employees under 40.[17] However, if one examines the comparative treatment of the oldest employees a different picture emerges; in July of 1982 petitioner laid off 60% of the employees

[17] J.A. 31-33. Petitioner laid off 3 of 14 employees 40 and over, and 9 of the 19 employees under 40. For reasons which are not apparent on the face of the record, the list of laid-off employees annexed to the July, 1985, affidavit of Sekeras contains less than half the names set forth in a list of laid-off employees provided by the company in January, 1985. Defendant's Response to Plaintiff's First Set of Interrogatories Directed to Defendant, Appendices A and B. The analysis in this note and the accompanying text is based on the lists attached to the Sekeras affidavit.

55 and older, but only 14% of the employees under 55.[18] In either event the sample size is small, and the evidentiary weight of the statistics thus limited, but a jury might plausibly draw from the underlying data either of two very different conclusions.

The fact that almost half of the employees laid off in July, 1982, were over 55, in a unit where only 15% of the workers were that old, was a result of Harbison-Walker's decision to concentrate the initial layoffs on installation specialists, the position in which most of its oldest workers were to be found. Thus in the July layoffs the company furloughed 3 of the 4 installation specialists, but only 1 of the 7 product specialists. A reasonable jury could draw different

[18] Id. Petitioner laid off in July 3 of the 5 employees 55 and over, and only 4 of the 28 employees under 55.

conclusions from the record regarding why this occurred. Sheatsley suggested that the decline in the need for employees was particularly great in the case of installation specialists,[19] a statement which, if credited by a jury, could provide a legitimate explanation for the disproportionately large number of installation specialists laid off. On the other hand, immediately after 2 of the 4 installation specialists, aged 55 and 59, were laid off, Sekeras announced that there was now a shortage of installation specialists and that other employees would as a consequence have to do installation work.[20] Sheatsley acknowledged that,

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19 J.A. 105 ("assistance in the installation of our refractories was definitely less needed, that was a prime consideration").

20 J.A. 118 ("The heaviest impact ... was in our Marketing Support Group which will seriously reduce our capability from Pittsburgh to follow installations

after the older installation specialists were laid off, it became necessary to direct almost all the other employees in the Marketing Support Group to do installation work.[21] A reasonable jury

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.... Sales people will be required to ... follow installations as required.... I ... expect each of you to take additional roles and responsibilities to help fill the gaps.... This means you may be required to ... even follow installations....")

21 J.A. 110:

"Q. Of those 32 that remained after the temporary furlough of the first 6, how many of those 32 actually, in fact, helped in doing Installation Specialist work in the months after then?

"A. I wouldn't be able to say specifically, but the majority or nearly all or perhaps all of the remaining non-clerical personnel with the possible exception of Don Jamison and myself. So the various Product Managers, the various Product Specialists and Product Analysts would have all contributed in this installation service area.

"Q. They would actually go on the job site?

might infer from this evidence that the decision to concentrate the layoffs on installation specialists was the result, not of a particularly severe decline in installation work, but of some entirely extraneous consideration, such as a desire to remove employees in their fifties.

The decision to retain Faust alone from among the installation specialists was explained by Sekeras as being a result of the need for someone with Faust's experience as a sales correspondent. (J.A. 14). Yet on August 2, 1982, only 3 days after Harbison-Walker had laid off the last of the installation specialists over 40, the company laid off the only sales correspondent in the unit. (J.A. 33). A jury might well infer from that action that the skills of a sales

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"A. Correct."

correspondent were not in fact needed by the company at all.

Sekeras insisted that Faust was retained and rehired, rather than Brieck, because Faust's "administration and sales correspondent experience permitted him to perform other noninstallation functions in the reduced department". (J.A. 15). The company's entire argument necessarily rests on the premise, at least implicit in Sekeras' statement, that company officials in fact believed that whichever installation specialist was retained, and later rehired, would in fact be performing a significant amount of "noninstallation functions". Faust's deposition, however, revealed that in fact he spent virtually all of his time on installation work. When asked what he did in July 1982, Faust

mentioned only installation work,[22] and Faust acknowledged that since being rehired in 1983 he had spent almost all his time on installation activities.[23]

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22 J.A. 149-50:

"Q. Could you describe for me what your duties were in July of 1982"

"A. I was assigned to the -- I was in the iron and steel department. I was assigned to work with Stan Pavlica on blast furnace projects and installations....

"Q. What were your duties when you worked with Mr. Pavlica?

"A. I went out on blast furnace installations."

23 J.A. 160:

"Q. Since coming back in August of '83, what has been the percentage of time you would spend on the job -- on the road as an installation specialist?

"A. 75, I guess, at least.

"Q. When you were involved in duties that aren't actual installations, what duties do you perform now, or what duties

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have you performed from August of '83 to the present date that have not been installation duties?

"A. Pretty much been related to that -- I write reports of the installation. Have to have time to come into the office to do that. I've also still done some work with the blast furnace group working on margins again. Doing some filing. Not much anymore. It's just piling up. But I still -

"Q. You do work with the blast furnace group?

"A. Right.

"Q. You do filing, and what was the other thing you said?

"A. Margins. Also some gofer work like getting drawings out to the works, to salesmen.

"Q. When you write reports of installations, any installation specialist would have to do that?

"A. Yes.

"Q. Even someone like Mr. Brieck--someone like Mr. Brieck in his old duties would have had to fill out reports regarding

As the third circuit properly recognized, Faust's description of his actual duties "raise a question of fact as to whether the employer really believed that Faust's 'varied' experience made him more qualified than Brieck to perform the job functions remaining in the reduced business environment." (Pet. App. 5a). The company offered in support of its motion for summary judgment no evidence purporting to explain this apparent discrepancy between the concerns which allegedly led it to retain and rehire Faust, and the work which Faust actually performed. In its brief in this Court the

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installations he had been involved in?

"A. Correct....

"Q. What percentage of your time since August of '83 has been spent doing margins? Very small percentage?

"A. Small percentages [sic], yes."

company seems to suggest that the discrepancy was merely the result of an innocent error, that the company officials believed in good faith, albeit mistakenly, that the employee in the position in which Faust was retained, and subsequently rehired, would be spending a large portion of his time on noninstallation work requiring the past experience of a sales correspondent. (Pet. Br. 20, 23). A jury could conceivably interpret the evidence in that way, but it would surely be reasonable for a jury to infer from what Faust actually did after the July, 1982, layoff that the real reason for the decisions to retain and rehire Faust was something other than his sales correspondent experience.

The instant case, in sum, is a classic example of the type of dispute which cannot be resolved, for either

party, by summary judgment, but must be submitted for resolution by the trier of fact, be it a judge or a jury. Genuine disputes about material facts are not merely present, they abound. This is not merely a situation in which a trial is required to resolve conflicts between the statements of the plaintiff and those of the defendant's officials; here a trial is necessary to resolve the conflicts among the statements of the company officials themselves. As petitioner's brief well illustrates, a jury which believed only the evidence, and drew only the inferences, most favorable to the company, might return a verdict for Harbison-Walker. But the contention on which petitioner's demand for summary judgment is grounded -- that "viewing 'the record as a whole' ... no 'rational trier of fact [could] find for [Respondent]' on his age

discrimination claim," (Pet. Br. 23-24) -- simply cannot be sustained.

III. THE DENIAL OF SUMMARY JUDGMENT IS CONSISTENT WITH RULE 56 AND THE AGE DISCRIMINATION IN EMPLOYMENT ACT

In view of the actual state of the record in this case, it is abundantly clear that summary judgment could not properly be awarded to petitioner. Proceeding on the basis of its assertion that this is a case in which there is literally no evidence of unlawful discrimination, petitioner argues that the decision of the third circuit must be based on some misconception as to the applicable legal principles. In light of the actual record, the legal issues briefed by petitioner do not appear to be presented by this case. Nonetheless, we set forth below the general principles applicable to a motion for summary

judgment, and then address briefly the specific arguments advanced by petitioner.

A. The Applicable Legal Standard

(i) Rule 56(c) of the Federal Rules of Civil Procedure authorizes the entry of summary judgment in a civil case if

> the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

"[A]t the summary judgment stage the judge's function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249 (1986).

> If ... the proofs fail to exclude all bases on which judgment might be rendered in favor of the person against whom the motion is made, summary judgment must be denied. And

> this would be true whether the issue is one of disputed fact or a question of how the trier would characterize admitted facts (e.g. as constituting negligence or the reverse). The device is not intended to resolve issues that are within the traditional province of the trier of fact, but rather to see whether there are such issues.

F. James and G. Hazard, Civil Procedure, 273 (2d ed. 1977) (footnotes omitted). The burden of persuasion is on the moving party, and that burden is a stringent one; any doubts as to the existence of a genuine issue for trial must be resolved against the party seeking summary judgment. Adickes v. S. H. Kress & Co., 398 U.S. 144, 158-59 (1970).[24] It may be

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[24] One authoritative commentator suggests that the procedures established by Rule 56 have in some instances been abused. 10 C. Wright, A. Miller and M. Kane, Federal Practice and Procedure § 2712, pp. 582-83 (1983). A motion for summary judgment, like any other motion, must be based on a reasoned belief that it is well grounded in fact and warranted by existing law. See Rule 11, F.R.C.P.

of considerable importance whether a given case, if it went to trial, would be heard by a judge or a jury.

> If the decision is to be reached by the court, and there are no issues of witness credibility, the court may conclude on the basis of the affidavits, depositions, and stipulations before it, that there are no genuine issues of material fact, even though decision may depend on inferences to be drawn from what has been incontrovertibly proved.... But where a jury is called for, the litigants are entitled to have the jury draw those inferences or conclusions that are appropriate grist for juries.

Nunez v. Superior Oil Co., 572 F.2d 1119, 1123-24 (5th Cir. 1978).

A motion for summary judgment also raises issues of a constitutional nature where, as here, the non-moving party has requested and would be entitled to have his claims resolved by a jury if the case went to trial. This Court's decision in Weinberger v. Hynson, Westcott & Dunning,

412 U.S. 609 (1973),[25] suggests that a different and more stringent standard should be applied where the effect of summary judgment would be to deny the jury trial requested by the non-moving party; at the least particularly great caution ought be exercised in deciding to grant summary judgment in such a case. Trial by deposition, like "[t]rial by affidavit is no substitute for trial by jury which so long has been the hallmark of 'even handed justice.'" Poller v. Columbia Broadcasting Co., 368 U.S. 464, 473 (1962).

> The right to confront, cr ss-examine and impeach adverse witnesses is one of the most fundamental rights sought to be preserved by the Seventh Amendment provision for jury trials in civil cases. The

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25 "If this were a case involving trial by jury as provided in the Seventh Amendment, there would be sharper limitations on the use of summary judgment." 412 U.S. at 621-22.

> advantage of trial before a live jury with live witnesses, and all the possibilities of considering the human factors, should not be eliminated by substituting trial by affidavit and the sterile bareness of summary judgment.

Adickes v. S. H. Kress & Co., 398 U.S. 144, 176 (1970) (Black, J. concurring)[26]

If on a motion for summary judgment the moving party clearly establishes that it would be entitled to a directed verdict if the case went to trial, the court may, consistent with the Seventh Amendment, award judgment. But a court asked to grant summary judgment in a case that would otherwise be referred for a trial to a jury must bear in mind the stringent constitutional restrictions on the

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[26] In his dissenting opinion in First National Bank of Arizona v. Cities Service Co., 391 U.S. 253, 304 (1968), Justice Black expressed concern that "the summary judgment technique tempts judges to take over the jury trial of cases, thus depriving parties of their constitutional right to trial by jury".

authority of judges to impinge on the factfinding authority of juries, and be alert to any possibility that the record that would be presented at trial might differ from the record on which summary judgment is sought.

(ii) This Court admonished in Hutchinson v. Proxmire, 443 U.S. 111, 120 n. 9 (1979), that a question regarding the state of mind of an individual "does not readily lend itself to summary disposition."[27] That unavoidable

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[27] See also White Motor Co. v. United States, 372 U.S. 253, 259 (1963) ("[s]ummary judgments ... are not appropriate 'where motive and intent play leading roles'"); Poller v. Columbia Broadcasting System, 368 U.S. 464, 473 (1962) ("We believe that summary judgment procedures should be used sparingly in complex antitrust litigation where motive and intent play leading roles, the proof is largely in the hands of the alleged conspirators, and hostile witnesses thicken the plot") (footnote omitted). The holding in Hutchinson is consistent with the practical judgment of the lower courts, which have repeatedly found summary judgment inappropriate in cases

limitation on the utility of summary judgment procedures arises for two distinct reasons. First, where the individual whose state of mind is at issue is still alive, and there is reason to believe that either party will call him to testify at trial, uncertainties about the demeanor and credibility of that witness will ordinarily preclude the granting of summary judgment. Because such a witness is the only person with personal knowledge of his or her own state of mind, a trier of fact is likely to rely very heavily on the credibility of that witness' testimony.

> [A] court should be cautious in granting a motion for summary judgment when resolution of the dispositive issue requires a determination of state of mind.

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involving a dispute about the knowledge or state of mind of an individual. 10A C. Wright, A. Miller & M. Kane, Federal Practice and Procedure, § 2730 (1983) (citing cases).

> Much depends on the credibility of the witnesses testifying as to their own states of mind. In these circumstances the jury should be given an opportunity to observe the demeanor, during direct and cross examination, of the witnesses whose states of mind are at issue.

Croley v. Matson Navigation Co., 434 F.2d 73, 77 (5th Cir. 1970). "[T]he manner of the [witness] while testifying is often times more indicative of the real character of his opinion than his words." Wainwright v. Witt, 469 U.S. 412, 428 n. 9 (1985). The certainty that no one else could directly contradict his testimony may lead such a witness to exaggerate or misrepresent his state of mind; if the witness is a party, or connected with a party to the proceeding, the dangers of relying on his statements at the summary judgment stage are particularly great.

Second, disputes regarding the state of mind of an individual frequently depend

on indirect and circumstantial evidence about whose significance reasonable people may well disagree. "[T]he question facing triers of fact in discrimination cases is both sensitive and difficult.... There will seldom be 'eyewitness' testimony as to the employer's mental process." U.S. Postal Service Bd. of Govs. v. Aikens, 460 U.S. 711, 716 (1983). Where the difficulty in resolving a factual question is especially great, the possibility that a court will be able to conclude that there is no genuine issue about the proper resolution of that question is likely to be particularly small.

The admonition in Hutchinson exemplifies the broader problem that arises whenever summary judgment is sought in a case to which the demeanor of a witness might be relevant, or even critical. In any case of that sort a

judge asked to rule on a motion for summary judgment will ordinarily have no way of knowing the nature of the demeanor evidence that would be presented at trial.[28] The judge's avoidable ignorance regarding that evidence will not invariably be fatal to a motion for summary judgment. The existence of necessarily unknowable demeanor evidence, like the existence of unexamined documentary evidence, would bar the entry of summary judgment only if the nature of that evidence could alter the outcome of that case. There could, of course, be a case in which "cross examination of the

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[28] This limitation is analogous to the posture of an appellate court asked to review a cold record to determine the sufficiency of the evidence to support a decision made, at least in part, on the basis of demeanor. See Anderson v. Bessemer City, 470 U.S. 564, 575 (1985); Wainwright v. Witt, 469 U.S. 412, 428 (1985); Patton v. Yount, 467 U.S. 1025, 1038 and n. 14 (1984).

[deponent or affiant] ... would be futile." Arnstein v. Porter, 154 F.2d 464, 470-71 (2d Cir. 1946). If in a wrongful death action, for example, the defendant both asserted that it had a witness who had seen the alleged decedent alive and well long after his purported death, and then actually produced the alleged decedent in court during the hearing on its motion for summary judgment, the plaintiff could not of course avoid the granting of the motion by insisting that cross-examination at trial might convince the trier of fact that the defense witness was lying.

There will, on the other hand, be cases in which the necessary absence of demeanor evidence will preclude the granting of a motion for summary judgment. "Where ... credibility is, or may be crucial, summary judgment becomes improper

and a trial indispensable." Cales v. Chesapeake & Ohio Ry. Co., 46 F.R.D. 36, 40 (W.D. Va. 1969).[29] If the moving party offers affidavits or depositions from witnesses whose truthfulness or reliability are disputed by the opposing party, the court at the summary judgment stage will not be able to rely on the statements of those witnesses. "[T]he mere fact that the witness is interested in the result of the suit is deemed sufficient to require the credibility of his testimony to be submitted to the jury as a question of fact." Sartor v.

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[29] The 1963 Advisory Committee note to Rule 56 observes:

> Where an issue as to a material fact cannot be resolved without observation of the demeanor of witnesses in order to evaluate their credibility, summary judgment is not appropriate.

10 A C. Wright, A. Miller & M. Kane, Federal Practice and Procedure, § 2726, p. 115 (1983); see generally id. at 113-21.

Arkansas Natural Gas Corp., 321 U.S. 620, 628 (1944). Where witnesses with personal knowledge of one or more critical facts offer statements in support of the motion, the court must consider the possibility that the demeanor evidence might convince the trier of fact, that the witnesses were unreliable, or even that their statements were the opposite of the truth.[30] A deponent or affiant, if called to testify in open court, might "convince all who

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30 A witness' bearing on the stand may convince a jury

> "not only that the witness' testimony is not true, but that the truth is the opposite of his story; for the denial of one, who has motive to deny, may be uttered with such hesitation, discomfort, arrogance or defiance, as to give assurance that he is fabricating, and that, if he is, there is no alternative but to assume the truth of what he denies."

Dyer v. MacDougall, 201 F.2d 265, 269 (2d Cir. 1952).

hear him testify that he is disingenuous and untruthful, and yet his testimony, when read, may convey a most favorable impression." Untermeyer v. Freund, 37 F. 342, 343 (S.D.N.Y. 1889). The court must bear in mind as well that cross-examination of a witness at a deposition may not be the equivalent of cross-examination at trial, both because the circumstances of a trial, including the presence of a judge or jury, might make a witness more forthcoming,[31] and because

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31 F. James and G. Hazard, Civil Procedure, 275 (2d ed. 1977):

> "There may be a chance that persons who are willing to perjure themselves in an affidavit and even in the informal atmosphere of a deposition may be impelled by the formal trappings of trial and the personal presence of the judge to tell the truth. When summary judgment is granted, this chance is lost.... The strongest case for affording this ... chance probably exists where all the facts are within

the non-moving party may be in a better position to examine the witness at trial in light of additional evidence that was discovered only after the original deposition, or which emerged only during the trial itself.[32]

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the exclusive knowledge of the movant."

Pinson v. Atchison, T. & S.F.R. Co., 54 F. 464, 465 (W.D. Mo. 1893):

"It is sometimes difficult and impossible to get so full, explicit and perspicuous a statement from the witness through a deposition as it is by his examination before court and jury."

[32] 10A C. Wright, G. Miller & M. Kane, Federal Practice and Procedure, § 2727, pp. 120-21 (1983)

"[W]hen the knowledge of the events or occurrences on which the action is based lies exclusively within the control of the party moving for summary judgment ... most commonly in actions in which the main issue involves the movant's state of mind ... [c]ourts have been reluctant to deprive the nonmoving party of the

The history of racial discrimination litigation well illustrates the correctness of the admonition in Hutchinson v. Proxmire. Over the course of the last three decades there have been literally thousands of federal court, state court, legislative and judicial findings of intentional racial discrimination. Yet in a great many of these instances the perpetrator, or one or more of its employees or agents, offered sworn testimony that no such invidious motives were involved. So far as we are aware there is not a single instance in

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opportunity of testing the credibility of the movant or his witnesses in open court.... 'there is a justifiable judicial fear of the injustice which could result from judgment based on affidavits asserting facts that are, because of their nature, incapable of being effectively controverted.'"

(footnotes omitted).

which any one of these witnesses was prosecuted for perjury, although it seems difficult to avoid the conclusion that much of this testimony was not truthful. We do not, of course, suggest that perjury prosecutions ought to become a regular adjunct to civil rights cases, and we do not ask this Court to hold that summary judgment may never be granted to a defendant charged with intentional discrimination. But in applying Rule 56 the courts must bear in mind that undue credulity in accepting sworn protestations of innocence in discrimination cases would, if indulged in in the past, have emasculated the statutory and constitutional prohibitions against purposeful discrimination, and that such credulity in the future would have an equally untoward effect.

B. Petitioner's Legal Arguments

(i) Petitioner repeatedly objects that the statements made by Brieck in his affidavit and deposition -- statements at times in direct conflict with the affidavit and depositions of company officials -- were "self-serving". (Pet. Br. 7, 8, 16 n.10). That is not an accepted basis for objecting to the statements of a witness in connection with either a trial or a motion for summary judgment. This is, after all, not a business school seminar on a hypothetical problem in microeconomics, but a lawsuit between parties who by definition have a direct material stake in its ultimate outcome. Parties do not ordinarily volunteer statements in the course of litigation unless those statements advance their own interests, and employees of a corporate defendant have substantial

reasons to want to provide testimony that will suit the purposes of, and please, their employer; in that sense almost all of the statements in the instant record were self-serving. Petitioner objects in particular to deposition testimony by Brieck that he was more skilled and better qualified than Faust; but having worked with Faust for years, Brieck certainly had substantial personal knowledge of their comparative skills, and was entirely competent to testify abut the matter. The company is, of course, free to argue to the jury that Brieck's testimony should be deemed unreliable because of his interest in the case, or to emphasize that possible source of bias in cross-examination, but petitioner cannot ask a court, in the context of a motion for summary judgment, to resolve such credibility issues in

advance of, and indeed in lieu of, any trial.

(ii) The company argues, in the alternative, that the statements of its own witnesses -- the very management employees alleged to have violated federal law -- must be deemed absolutely and unimpeachably credible. Petitioner frames its contention in the context of an interesting, but somewhat implausible, hypothetical situation. If in an ADEA case a plaintiff were to adduce no evidence of discrimination other than that he had been laid off while a younger employee was retained, and if the defendant were to offer an affidavit or deposition testimony asserting that the decision had been made on a specified non-discriminatory basis, petitioner insists that a court would be required, as a matter of law, to grant summary judgment

for the defendant, unless the plaintiff were to come forward with additional evidence. (Pet. Br. 14-19). On petitioner's view that defense affidavit or deposition would have to be treated as conclusive, regardless of whether it was self-serving, and despite the fact that the trial court would have had no opportunity to observe the demeanor of the affiant or deponent. This hypothetical problem, of course, is not presented by the instant case, for the record here contains a broad array of other evidence, some favorable to petitioner, and some supporting respondent's claim of discrimination.

Petitioner grounds its argument about this hypothetical case on Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981), which sets forth the allocation and order of presentation of

proof in the trial of a discrimination claim. Under Burdine a plaintiff may establish a prima facie case of discrimination by adducing evidence that he was available and qualified for the position, and was rejected under circumstances which give rise to an inference of unlawful discrimination, 450 U.S. at 253; in an age discrimination layoff case, the courts below correctly recognized, such a prima facie case can be established by proof that a plaintiff in the protected age group was laid off while an employee under 40 in the same position was retained. (Pet. App. 2a, 3a, 15a). Once a prima facie case has been established, the burden shifts to the defendant to adduce "evidence that the plaintiff was rejected, or someone else preferred, for a legitimate, nondiscriminatory reason." 450 U.S. at

254. If the defendant does so, the burden shifts back to the plaintiff "to persuade the trier of fact that the proffered reason was not the true reason for the employment discrimination". 450 U.S. at 256.

Petitioner's analysis is for several reasons inconsistent with the holding in Burdine. The heart of petitioner's argument is that the effect of defense evidence articulating a legitimate reason for the disputed decisions is to eliminate any genuine issue of fact regarding the discrimination claim, unless the plaintiff proceeds to introduce additional evidence of a very specific nature. (Pet. Br. 17-18). But Burdine held squarely to the contrary, explaining that the result of the introduction of such defense evidence was to "rais[e] a genuine issue of fact as to whether [the defendant] discriminated

against the plaintiff." 450 U.S. at 255. Burdine does not attribute to defense evidence of a legitimate reason the decisive significance urged by petitioner.[33]

Second, Burdine insisted that the purported legitimate reason be contained in admissible evidence, rather than a pleading or argument of counsel, and admonished the trier of fact to carefully scrutinize "[t]he sufficiency of the defendant's evidence" offered to rebut a prima facie case. 450 U.S. at 256. When petitioner discusses a hypothetical situation in which there is no evidence

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[33] Similarly, in U.S. Postal Service Bd. of Govs. v. Aikens, 460 U.S. 711 (1983), this Court held that the effect of the introduction of evidence rebutting a prima facie case was not to compel dismissal of a case, but to require "the factual inquiry [to] procee[d] to a new level of specificity," and to put the trier of fact "in a position to decide the ultimate issue in the case." 460 U.S. at 714.

other than the ages of the two employees and the articulation of a "legitimate reason", it posits a case which quite literally could never occur. There will in fact always be additional evidence; the court necessarily will also know something about the job at issue, and the defendant witness will assert, not an unnamed "legitimate reason", but some specific identified reason. A court presented with a motion for summary judgment or a trier of fact will always have at least some basis for evaluating the proffered explanation, and in certain cases might on that basis entertain serious or even fatal doubts about its authenticity. If in this case, for example, Sekeras had claimed in his sworn deposition that he had chosen to retain Faust rather than Brieck because of a then recently published horoscope, that preposterous but non-discriminatory

explanation would on petitioner's view have required the entry of summary judgment for the company, although no sensible judge would have granted such a motion.[34]

Finally, petitioner insists that a plaintiff should not be permitted to defeat a motion for summary judgment merely by relying on his prima facie case and the possibility that the trier of fact, after observing the demeanor of the witness who had executed the affidavit or gave deposition relied on by the defendant, might conclude that the witness was lying. Burdine squarely holds that, if a discrimination case goes to trial, the trier of fact may indeed reject an

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[34] "[T]he witness' ... story itself may be so internally inconsistent or so implausible on its face that a reasonable factfinder would not credit it." Anderson v. Bessemer City, 470 U.S. 564, 575 (1985).

explanation as pretextual solely on the basis of the prima facie case and the lack of credibility of the witness offering the employer's justification:

> [P]laintiff's initial evidence ... and inferences properly drawn therefrom may be considered by the trier of fact on the issue of whether the defendant's explanation is pretextual. Indeed, there may be some cases where the plaintiff's initial evidence, combined with effective cross-examination of the defendant will suffice to discredit the defendant's explanation.

450 U.S. at 255 n.10. Burdine stressed that a plaintiff may prevail, inter alia "by showing that the employer's proffered explanation is unworthy of credence." 450 U.S. at 256.[35] At trial the evidence on which such a showing might be made could

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35 Similarly, the Court held in U.S. Postal Service Bd. of Govs. v. Aikens that it was for the trier of fact to decide regarding the evidence "whatever weight and credence it deserves." 460 U.S. at 714 n. 3 (1983).

well be the demeanor of the witness, if he "fidgets when answering critical questions, his eyes shift from the floor to the ceiling, and he manifests all other indicia traditionally attributed to perjurers". Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 270 (1986) (Rehnquist, J., dissenting). An employer may insist that its star witness is the paragon of truthfulness sought by Diogenes, but the trier of fact might conclude that the witness more closely resembles automobile publicist Joe Isuzu. If, as Burdine holds, a proffered explanation could be rejected largely or solely on the basis of credibility, it necessarily follows that a plaintiff would ordinarily be entitled to a trial at which he could attack the credibility of that witness and provide the trier of fact with an opportunity to observe the demeanor of that witness. The

decisive weight which petitioner seeks to accord to such defense testimony -- regardless of its credibility -- is squarely contrary to the intent of the framers of Rule 301 of the Federal Rules of Evidence.[36]

This is not to say, as petitioner suggests, that summary judgment will never be available in discrimination cases. In such cases, as in all other judicial proceedings, there is invariably a body of clearly undisputed facts, and in some

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36 The Advisory Committee note to Rule 301 states in part:

> "The so-called 'bursting bubble' theory, under which a presumption vanishes upon the introduction of evidence which would support a finding of the nonexistence of the presumed fact, even though not believed, is rejected as according presumptions 'too slight and evanescent' an effect.

(Emphasis added). Federal Civil Judicial Procedure and Rules, 274 (1987 ed.).

instances those facts might be sufficient to warrant the granting of a motion under Rule 56. In the instant case, for example, if Harbison-Walker had had prior to 1982 a written, uniformly and repeatedly enforced rule giving preferential treatment in layoffs to whichever worker had held the largest number of different positions at the company -- a rule whose existence could in all probability have been established by reference to objective facts raising no issues of credibility -- summary judgment might well have been appropriate. But where, as here, an employer chooses, or is compelled by the nature of the evidence, to hang its hopes on the statements of one or more witnesses that they made the disputed employment decision for some legitimate, non-discriminatory reason, Rule 56 does not authorize a court

presented with a motion for summary judgment simply to ignore the possibility that those witnesses are lying, or to attempt to assess the credibility of the witnesses without having had any opportunity to observe their demeanor.

(iii) Petitioner asserts, finally, that the claims in this case amount to little more than an attack on the company's "business judgment," contrary to the intent of Congress that "management prerogatives ... be left undisturbed" to the extent no unlawful discrimination is involved. (Pet. Br. 7, 10, 19 n. 13) We do not suggest that Congress intended the fair employment laws to turn federal judges into captains of industry. The statutes which prohibit intentional discrimination do not make it a federal offense for a company to make business judgments which are mistaken, silly, or

financially suicidal; an employer foolish enough to do so may, if it acts in good faith, deliberately prefer incompetence to competence, corruption to honesty, or mendacity to truthfulness. But neither the intent of Congress to leave untouched neutral albeit mistaken business decisions, nor impassioned invocation by a defendant of the importance of management prerogatives, can prevent a federal court from considering whether in a particular case a disputed action was in reality taken for invidious reasons. Texas Dept. of Community Affairs v. Burdine, 450 U.S. at 259.

Petitioner appears to contend that a finding of purposeful employment discrimination, if based in part on proof that the plaintiff was better qualified than the individual actually hired, promoted or retained, would have the

effect of making innocent and unavoidable errors of business judgment a violation of federal law. On this view a plaintiff in an ADEA or Title VII suit cannot offer evidence that he or she was better qualified than the employee who actually won or kept the desired job. This is, of course, precisely the opposite of the position taken by the defendant employer in Patterson v. McClean Credit Union, No. 87-107 which maintains that a plaintiff in an employment discrimination case must offer such evidence of his or her superior qualifications.[37] We maintain that the correct rule is an intermediate one,[38]

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[37] Brief for Respondent, No. 87-107, pp. 41-46.

[38] The Court noted in Texas Dept. of Community Affairs v. Burdine that evidence that a rejected applicant was in fact better qualified than the individual hired, retained or promoted "may be probative of whether the employer's reasons are pretexts for discrimination." 450 U.S. at 259.

that evidence of comparative qualifications may be offered by either party in an employment discrimination action, that the presence or absence of such evidence is not as a matter of law either necessary or sufficient to establish the existence of unlawful discrimination, and that the weight to be accorded evidence of this sort must be evaluated by the trier of fact in the context of all the other circumstances of the case.

C. The Role of Discretion in Disposing of Motions for Summary Judgment

Rule 56 accords to the district court a degree of discretion to deny a motion for summary judgment if the judge believes that the "just, speedy, and inexpensive determination" of a case would be facilitated by permitting the case to go

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to trial.[39] Under Rule 50(a), which permits a judge to grant a directed verdict, it is a common practice for judges to defer action on a motion for a directed verdict and wait until the jury has returned its verdict. The considerations which militate in favor of postponing action on a motion for a directed verdict will at times be applicable to a motion for summary judgment.

Whenever a district judge grants a motion for a directed verdict without awaiting the jury's verdict, he or she runs the risk that the order, if overturned on appeal, will have had the

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[39] 10 C. Wright, G. Miller & M. Kane, Federal Practice and Procedure, § 2728, pp. 187-88 and n. 11 (1983) (citing cases); cf. Kennedy v. Silas Mason Co., 334 U.S. 249, 257-58 (1948) (although summary judgment might technically be possible, in some cases "good judicial administration" requires that case be tried on the merits).

effect of postponing the trial, and possibly precipitating a second appeal, thus significantly delaying the final disposition of the case, and substantially increasing the burdens on the judiciary and parties alike. If, as a district judge believes, there is indeed too little evidence to support a verdict for the non-moving party, it is extremely likely that a jury would return a verdict in favor of the moving party, thus greatly simplifying the issues on appeal, and quite possibly discouraging any appeal at all by the non-moving party. If, on the other hand, the propriety of a directed verdict is a close question, the odds that the jury might err in its verdict may be higher, but so is the danger that an order directing a verdict will be overturned. For these reasons the decision whether to defer action on a motion for a directed verdict

often depends greatly on the length of the trial proceedings that lie ahead. Where only a few days of trial are involved, the very small amount of time and energy that could be saved by directing a verdict is likely to be outweighed by the substantial delays and unnecessary cost that will be involved if the decision to direct a verdict is overturned; a brief trial brings the proceedings to an end, and will entail far less time and energy than would be involved in the preparation of trial and appellate court briefs, and the drafting of judicial opinions at both levels. Conversely, where a long and expensive trial is still in the offing at the close of the plaintiffs' case, the court ought to be substantially more

willing to run the risks inherent in ordering a directed verdict.[40]

The substantive issue raised by a motion for summary judgment is similar to that posed by a motion for a directed verdict. Anderson v. Liberty Lobby, Inc., 477 U.S. at 250, 251 (1986).[41] Professor

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40 The desirability of deferring action on a motion for a directed verdict until the jury has first returned its own verdict is discussed in 9 C. Wright and G. Miller, Federal Practice and Procedure, § 2534, p. 586 (1971) (citing cases); 5A Moore's Federal Practice ¶ 50.05[3] (1988).

41 The differences in the procedural posture of these motions may cut both ways in the district court's decision as to whether to await the verdict of the jury. Because a motion for summary judgment comes prior to the presentation of the plaintiff's case, the length of the possibly unnecessary case will be longer than would be true on a motion for a directed verdict; conversely, at the summary judgment phase the court will often have a less complete understanding of the case than would be true after the close of the plaintiff's case, particularly regarding demeanor evidence, and thus runs a greater risk of error if it grants the motion.

The substantive standards for

Moore has observed:

> The delay and waste that result from improper handling by the district court of the motion for summary judgment bears a certain resemblance to the delay and ... waste from the improper handling of the motion for directed verdict.... It is a waste of judicial resources if tremendous time and energy must be spent by a party resisting a motion for summary judgment either to convince the district court that the motion should be denied, or where the district court has granted the motion, in obtaining a reversal.

6 Moore's Federal Practice ¶ 56.02 [10], p. 56-46 (1987). A district court presented with a motion for summary judgment ought in deciding how to act on that request exercise the same discretion,

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granting a motion for summary judgment and a motion for a directed verdict may differ to some degree. See 10 C. Wright, G. Miller and M. Kane, Federal Practice and Procedure, § 2713, pp. 617-20 (1983); cf. Dombrowski v. Eastland, 387 U.S. 82, 84 (1967) (evidence sufficient to withstand motion for summary judgment, although not necessarily sufficient to support jury verdict for non-moving party).

for essentially the same reasons, that would be appropriate if a directed verdict were requested in the proceeding.

> Summary judgment, with ever-lurking issues of fact, is always a treacherous shortcut.... Such relief is always discretionary, and in [some] cases ... sound judicial administration dictates that the court withhold judgment until the whole factual structure stands upon solid foundation of a plenary trial where proof can be fully developed, questions answered, issues clearly focused and facts definitively found.

Petition of Bloomfield S.S. Co., 298 F. Supp. 1239, 1242 (S.D.N.Y. 1969)

> [E]ven though the summary judgment standard appears to have been met, the court should have freedom to allow the case to continue when it has doubt as to the wisdom of terminating the action prior to a full trial.... This is especially true if disposing of the summary judgment motion would require as much time as a full trial on the merits; in the event Rule 56 no longer serves the purpose of saving the court's and litigant's time.

10A C. Wright, G. Miller & M. Kane, Federal Practice and Procedure, § 2728, pp. 188-92 (1983) (footnotes omitted).[42] Judge Frank a generation ago admonished, "The district courts would do well to note that time has often been lost by reversals of summary judgments improperly entered." Doehler Metal Furniture Co. v. United States, 149 F.2d 130, 135 (2d Cir. 1945).

We do not contend that action on a motion for summary judgment should automatically be deferred until after trial, even if the trial is likely to be a

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42 Elliott v. Elliott, 49 F.R.D. 283, 284 (S.D.N.Y. 1970) (summary judgment "is intended to economize the court's time, and its purpose is totally frustrated if determination of the motion would require as much time as a full trial on the merits"); First Nat. Bank v. Cities Service Co., 391 U.S. 253, 304 (1968) (Black, J., dissenting) ("summary judgment ... took 11 years.... It certainly would not have taken one-tenth of that much time to give the case a full-dress trial. An excuse for summary judgments has always been that they save time").

short one; we suggest only that the decision whether to do so ought be made in a deliberate and informed manner. In a case where a Seventh Amendment jury has been requested, deferring action until the jury has spoken may avoid the constitutional issues that would be raised if summary judgment were granted; a jury verdict in favor of the moving party, if challenged on appeal, would ordinarily raise only non-constitutional issues.

This case, we urge, illustrates the need for such a carefully considered exercise of discretion. The instant controversy involves a modest number of witnesses and documents; it could have been tried in a few days after the completion of discovery in 1985. Had the jury accepted the interpretation of the evidence advanced by petitioner in this Court, its verdict in favor of the company

would in all likelihood have ended the litigation. Had the jury returned a verdict for plaintiff, and the defendant filed the necessary motions for directed verdict and judgment n.o.v., the appeal which followed would have raised virtually the same issues and have been heard at virtually the same point in time, as the instant appeal regarding the motion for summary judgment. By choosing instead to grant the motion for summary judgment, the district court risked what may prove to be three years of unnecessary appellate litigation in order to avoid a trial of as many days. If this Court had before it both the verdict of a jury and the judgment of the trial court as to the sufficiency of the evidence, the Court would be in a position to bring this litigation to a close. Because, however, the district court opted to rule on the

motion without awaiting a jury verdict, this Court, like the court of appeals, must now remand the case for the trial that could have occurred in 1985, and perhaps for a second round of appeals as well.

CONCLUSION

For the above reasons the judgment and opinion of the third circuit should be affirmed.

Respectfully submitted,

JAMES H. LOGAN*
Logan & Logan
307 Fourth Avenue
Pittsburgh, PA. 15222
(412) 765-0960

JULIUS LeVONNE CHAMBERS
CHARLES STEPHEN RALSTON
RONALD L. ELLIS
ERIC SCHNAPPER
NAACP Legal Defense and
Educational Fund, Inc.
99 Hudson Street
New York, New York 10013
(212) 219-1900

Counsel for Respondent

*Counsel of Record

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